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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ELMER VELIZMANCIA, Defendant and Appellant.	G051001 (Super. Ct. No. 14CF2090) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Sheila F. Hanson, Judge. Affirmed.

Nancy L. Tetreault, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Scott C. Taylor and Charles C. Ragland, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted defendant Elmer Velizmancia of meeting a minor with the intent to engage in lewd conduct (Pen. Code, § 288.4, subd. (b); count 1),[1] attempting to contact a child with the intent to commit a lewd act (§§ 664, 288.3, subd. (a); count 2), and attempting to commit a lewd act upon a child under the age of 14 (§§ 664, 288, subd. (a); count 3). The trial court sentenced defendant to three years in prison on count 1, and stayed concurrent terms of three years each on counts 2 and 3 under section 654.

Defendant contends insufficient evidence supports his conviction on count 3, the court erred in instructing with CALCRIM No. 371 on consciousness of guilt, and resentencing is required on count 2. We conclude no error occurred and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Gary L. (Gary) received a group text message, advertising a scheme to make money. He replied, "Stop," but then received a message asking, "Stop what?" Gary texted back that he was a "12-year-old kid," hoping the text messages would stop if the sender knew he had no decision-making power.

The sender, however, later identified as defendant, continued texting Gary. Defendant inquired about Gary's age and sex and texted him a photograph of a shirtless man flexing his muscles. Although Gary stated he was a 13-year-old girl, defendant requested "multiple times" if they could meet. To defendant's question of whether Gary had ever had sex before, Gary responded by asking if that meant "we'll have sex together?" Defendant said "Yes" and wanted to know if "you can be all night with me."

Gary called the police. Upon arriving at Gary's home, police officers reviewed his text exchanges with defendant and instructed him to arrange to meet

[1] All further statutory references are to the Penal Code.

defendant at the Big Lots store in Tustin, California that night. Defendant texted Gary that he was scared about being arrested because "you are 13." Gary answered, "Well, don't come over, then." Defendant replied, "Why? You need to understand me. You said before, remember?" He continued with: "Baby, understand me, please." "I want to see you but I'm nervous." Gary responded, "I am okay. I just want to make sure you know I am 13."

After that, Gary gave his cell phone to the officers, who continued texting with defendant while waiting for him at the meeting spot. Defendant did not show and around 9:00 p.m. texted that he had a flat tire. He later texted, "Love, I want to be with you tonight." He also called Gary's number but the officers, both male, did not answer and instead texted back as the girl, stating she was using her dad's phone because she had dropped hers. When defendant expressed concern her dad would see his messages, the officer assured him they would be deleted. Defendant said he would buy her a phone.

The officer and defendant continued to talk. At some point, one of the officers pretended to be angry. Defendant responded, "What I do now. WTF. I'm angry." He then asked for forgiveness, and said, "OMG. Believe me. Please. I'm sure I want to be with you." The officers texted back with "Whatever" and a "frownie face." Defendant inquired if they could be together that night and gave his address and directions. When the officers told him "[f]orget it," defendant requested to meet the next night because "I want everything with you."

The officer returned Gary's phone to him around 11:00 p.m., who continued replying to the text messages. From that time until about 2:00 a.m., defendant texted Gary "relentlessly." Defendant tried to have Gary meet him in West Covina, California. Gary repeated that "she" was 13 years old and had no transportation. Defendant said he would take her to a motel and make love to her all night. The messages kept "rolling in" one after the other until 2:00 a.m. the next morning.

At about 8:00 a.m., Police Officer Matthew Roque resumed texting with defendant on a police-issued cell phone stating, "Text me on this phone now, don't text me on my father's phone anymore." Defendant immediately asked to meet. Roque, as the girl, said she would ask permission from her parents to sleepover at a friend's house. Defendant then asked if she had a boyfriend. When Roque answered no, defendant said, "But before you had sex with a man, tell me, please?" Roque responded, "No, I told you that yesterday. You said you teach me. Is that okay?" Defendant replied, "Oh okay. Maybe you can be my partner for life," followed by "I'll kiss you all body baby." Roque ended the conversation by pretending the girl's mother was picking her up.

That evening, Roque asked defendant if they were still meeting that night. Defendant said yes, they would meet at 9:30 p.m. Roque suggested they could meet at a hotel where a friend's sister worked but defendant preferred somewhere else because he did not want the alleged friend to know where they were all night. They agreed to meet at the Big Lots store again. Defendant said he would be driving a black Volkswagen Jetta.

At the arranged time, several officers positioned themselves around the Big Lots store and waited for defendant. A petite female officer dressed in plain clothes posed as the girl. Defendant texted he was running late and to "wait please." Around 10:30 p.m., defendant arrived alone, driving a black Volkswagen Jetta. He passed the female police officer and parked. As officers approached, defendant looked around and then down at his cell phone, tapping the lit screen with his finger.

Roque removed defendant from his car and took his cell phone. Defendant's cell phone showed none of the text messages between defendant and Gary's phone or the police-issued phone.[2] But when Roque looked at the police-issued phone,

[2] The jury received records of the retrieved text messages and call history currently on the phones of defendant, Gary, and the police-issued phone. The parties stipulated that deleted messages could not be extracted.

he saw a text from defendant that he had not yet responded to, asking "Where are you?" Roque texted "Here," which then appeared on defendant's phone. Another officer searched defendant and discovered six unopened condoms in the right pocket of his jacket.

DISCUSSION

Attempted Commission of a Lewd Act on a Child

Defendant contends substantial evidence does not support his conviction for attempted commission of lewd act upon a child. We disagree.

"To determine the sufficiency of the evidence to support a conviction, an appellate court reviews the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Kipp* (2001) 26 Cal.4th 1100, 1128.) We do not resolve credibility issues or evidentiary conflicts because determination of witness credibility and the truth or falsity of facts is the exclusive province of the trier of fact. (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.) "A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support"' the jury's verdict." (*Ibid.*)

To prove an attempted violation of section 288, subdivision (a),[3] the prosecution must show "(1) the defendant intended to commit a lewd and lascivious act with a child under 14 years of age, and (2) the defendant took a direct but ineffectual step

[3] Under section 288, subdivision (a), "any person who willfully and lewdly commits any lewd or lascivious act . . . upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony . . . ."

toward committing a lewd and lascivious act with a child under 14 years of age." (*People v. Singh* (2011) 198 Cal.App.4th 364, 368; see *People v. Crabtree* (2009) 169 Cal.App.4th 1293, 1322 (*Crabtree*) ["An attempt to commit a lewd act upon a child requires both an intent to arouse, appeal to, or gratify 'the lust, passions, or sexual desires of [the defendant] or the child' [citation] 'and . . . a direct if possibly ineffectual step toward that goal — in other words, he attempted to violate section 288'"].)

Defendant argues the prosecution failed to show he "took a direct but ineffectual step toward touching the fictitious girl." According to defendant, the charge had been based "on text communications he had with a fictitious 13-year-old girl" during which he "did not indicate he was touching himself [or] suggest in any way that the girl should touch her own body." And while he may have indicated he wanted to have sexual relations with the girl, he "never went beyond planning and preparation" and when he "arrived at the meeting place, [he] was arrested before he could take a direct step toward any form of touching, whether direct or constructive," "which would not have been possible because the girl did not exist." We are not persuaded.

"'"Although mere preparation such as planning or mere intention to commit a crime is insufficient to constitute an attempt, acts which indicate a certain, unambiguous intent to commit that specific crime, and, in themselves, are an immediate step in the present execution of the criminal design will be sufficient. [Citations.]" [Citations.]' [Citation.] No clear marker divides acts that are merely preparatory from those initiating the criminal act. Nonetheless, 'the more clearly the intent to commit the offense is shown . . . "the more likely that steps in the early stages of the commission of the crime will satisfy the overt act requirement"' of an attempt." (*Crabtree, supra*, 169 Cal.App.4th at p. 1322.)

In *Crabtree*, the defendant contacted a police officer posing online as "Hope," a 13-year-old runaway living in Sacramento. (*Crabtree*, *supra*, 169 Cal.App.4th at p. 1306.) The two engaged in numerous online chats regarding sex and planned a

rendezvous to have sex in a hotel. The defendant sent "Hope" a bus ticket for the trip from Sacramento to Los Angeles. (*Id.* at pp. 1306–1307.) When the defendant arrived at the bus station looking for "Hope," police arrested him. (*Id.* at pp. 1307-1308.)

Crabtree rejected the defendant's argument his conduct constituted nothing more than preparatory acts: "Appellant does not contest the fact he drove to the bus station where he expected 'Hope' to appear pursuant to his devious plan. He does not challenge the fact that, upon his arrest, Viagra, condoms, a bikini, and bubble bath were discovered in his trunk. The presence of these items, which are consistent with appellant's sexually charged online chats with 'Hope,' and the fact he had bought the bikini shortly before his anticipated meeting with 'Hope,' strongly show appellant's intent to carry out his intended lewd act upon 'Hope.' Nothing more was necessary." (*Crabtree, supra,* 169 Cal.App.4th at p. 1322.)

Similarly, here defendant exchanged multiple sexually charged text messages with someone he believed to be a 13-year-old girl. He drove to the Big Lots expecting to meet that girl in order to take her to a hotel where nobody knew them so he could "teach" her about sex, kiss her all over her body, and have sexual relations with her all night. To that end, he carried six unopened condoms in his jacket pocket. These acts are consistent with his sexually explicit text messages and strongly "indicate a certain, unambiguous intent to commit" a lewd act upon, or touch, the 13-year-old girl. The evidence was thus sufficient to support the defendant's conviction for attempting to commit a lewd act upon a child.

Defendant's claim it was not possible for him to touch the girl because she was fictitious lacks merit. "There need be no '"present ability" to complete the crime, nor is it necessary that the crime be factually possible.'" (*People v. Reed* (1996) 53 Cal.App.4th 389, 396 (*Reed*).) "Our courts have repeatedly ruled that persons who are charged with attempting to commit a crime cannot escape liability because the criminal

act they attempted was not completed due to an impossibility which they did not foresee: 'factual impossibility is not a defense to a charge of attempt.'" (*Ibid*.)

In *Reed*, a detective responded to the defendant's sexual advertisement in a magazine. (*Reed, supra*, 53 Cal.App.4th at p. 393.) The detective pretended to be a mother with children aged 12 and 9. (*Ibid*.) The "mother" asked the defendant to educate her children about sex. (*Id*. at p. 394.) The defendant wrote about how he would have sexual contact with the children, such as "touching of genitals, play with sex toys, oral sex, and intercourse." (*Id*. at p. 395.) Law enforcement set up a meeting at a motel between the defendant, the "mother" and children. The defendant was arrested at the motel when he entered the room where he was told the children would be. (*Id*. at p. 395.)

On appeal, the defendant in *Reed* asserted that he could not be convicted of attempted child molestation because the victims were imaginary and therefore the defendant could not fulfill all the elements of the offense. (*Reed, supra*, 53 Cal.App.4th at p. 396.) The *Reed* court rejected the argument, explaining, "[I]f the circumstances had been as defendant believed them to be, he would have found in the [motel] room he entered two girls under fourteen available for him to engage in lewd and lascivious conduct with them. Defendant's failure to foresee that there would be no children waiting does not excuse him from the attempt to molest." (*Id*. at p. 397.) We reject defendant's contention here for the same reason.

Defendant argues *Reed* is inapposite because the defendant in that case took the extra stop of entering the room where he believed the children to be.[4] (See *Reed, supra*, 53 Cal.App.4th at p. 399 [the defendant's "act of walking with the undercover deputy into the room he expected to contain the girls was clearly a step beyond mere preparation for the crime, though it was not an element of the crime. That this was an unequivocal first act in carrying out the intended crime is especially evident given that his

[4] Defendant does not otherwise distinguish *Reed, supra*, 53 Cal.App.4th 389.

plan for the seduction was known in detail to the officers at the time they arrested him"].) But as noted above, no bright line exists for distinguishing when preparatory acts cross over to commencement of the criminal act. (*Crabtree, supra*, 169 Cal.App.4th at p. 1322; *Hatch v. Superior Court* (2000) 80 Cal.App.4th 170, 187-188.) In *Crabtree*, the court determined the defendant's acts of driving to the bus stop to meet the purported victim, preceded by his sexually-charged online conversations, and combined with the items he brought with him, sufficed to demonstrate he intended to carry out lewd acts on the victim. (*Crabtree*, at p. 1322.) We conclude the facts of this case are also sufficient to make that showing.

Instructing The Jury on Consciousness of Guilt

The court instructed the jury with CALCRIM No. 371 as follows: "If the defendant tried to hide evidence that conduct may show that he was aware of his guilt. If you conclude that the defendant made such an attempt, it is up to you to decide its meaning and importance. However, evidence of such an attempt cannot prove guilt by itself." The court gave the instruction based on a police officer's testimony he saw defendant tapping his finger on his cell phone as police officers approached defendant's car.

Defendant argues the giving of this instruction was error because he could have been sending the text message asking "Where are you?" and that it was speculation to conclude he was deleting messages. No error occurred.

Defendant acknowledges that "'facts giving rise to an inference of consciousness of guilt [need not] be conclusively established before [the instructions] may be given . . . ; there need only be some evidence in the record that, if believed by the jury, would sufficiently support the suggested inference.'" (*People v. Alexander* (2010) 49 Cal.4th 846, 921.) In claiming the only evidence proffered by the prosecution was the

testimony of the officer, defendant overlooks evidence showing the text messages existed despite not appearing on his phone.

As the Attorney General states, "[N]one of the messages between [defendant] and [Gary] or between [defendant] and the police officers appeared on [defendant's] phone," yet "[t]he jury knew the text messages existed because it received those messages from information extracted from [Gary's] phone and the police phone." Additionally, although defendant admits he had just sent a text to the police-issued phone asking "Where are you?" that message was not on his phone when police confiscated it, indicating he had recently deleted text messages from his phone. Supporting that inference was Roque's response "Here," which appeared on defendant's phone after all the other text messages had been deleted.

The evidence sufficiently supported the inference of consciousness of guilt. The court did not err in instructing the jury with CALCRIM No. 371.

Calculation of Sentence

On count 2, attempting to contact a minor with the intent of committing a lewd action (§§ 664, 288.3, subd. (a)), the court imposed the midterm of three years and stayed it pursuant to section 654. Defendant contends remand is required for resentencing on that count because the court miscalculated the term. Not so.

Section 288.3, subdivision (a) provides: "Every person who contacts or communicates with a minor, or attempts to contact or communicate with a minor, who knows or reasonably should know that the person is a minor, with intent to commit an offense specified in Section . . . 288 . . . involving the minor *shall be punished by imprisonment in the state prison for the term prescribed for an attempt to commit the intended offense*." (Italics added.) The term prescribed for the commission of lewd acts on a child under the age of 14 is three, six, or eight years. (§ 288, subd. (a).) An attempted crime is punishable by "one-half the term of imprisonment prescribed upon a

conviction of the offense attempted." (§ 664, subd. (a).) One half the midterm of six years for an attempted violation of section 288.3 is three years, which is what the court imposed.

Defendant maintains the court should have imposed a sentence of one and one-half years on count 2. He reasons that taking the midterm sentence of six years for section 288, subdivision (a), then the midterm sentence for an attempt to violate that statute, which is three years, "the sentence needed to be cut in half a second time, pursuant to section 664, subdivision (a)." But defendant's failure to support his contention with reasoned argument and citations to authority forfeits it. (*People v. Stanley* (1995) 10 Cal.4th 764, 793.)

DISPOSITION

The judgment is affirmed.

IKOLA, J.

WE CONCUR:

MOORE, ACTING P.J.

FYBEL